

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. AGAPITO LISTERIO Y PRADO AND SAMSON DELA TORRE Y ESQUELA, ACCUSED, AGAPITO LISTERIO Y PRADO, ACCUSED-APPELLANT.

G.R. No. 122099. July 05, 2000

Ponente: YNARES-SANTIAGO, J.

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YNARES-SANTIAGO, J.:

For the deadly assault on the brothers Jeonito Araque and Marlon Araque, Agapito Listerio y Prado, Samson dela Torre y Esquela, Marlon dela Torre, George dela Torre, Bonifacio Bancaya and several others who are still at large were charged in two (2) separate Amended Informations with Murder and Frustrated Murder.

In Criminal Case No. 91-5842 the Amended Information[1] for Murder alleges –

That on or about the 11th day of August 1991 in the Municipality of Muntinlupa, Metro Manila, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, conspiring and confederating together and mutually helping and aiding one another, all armed with bladed weapons and GI lead pipes, with intent to kill, treachery and evident premeditation with abuse of superior strength did then and there willfully, unlawfully and feloniously attack, assault and stab one Jeonito Araque y Daniel at the back of his body, thereby inflicting upon the latter mortal wounds which directly caused his death.

CONTRARY TO LAW.

In Criminal Case No. 91-5843, the Amended Information[2] for Frustrated Homicide charges:

That on or about the 14th day of May 1991 in the Municipality of Muntinlupa, Metro Manila, Philippines and within the jurisdiction this Honorable Court, the above-named accused, conspiring, confederating together, mutually helping and aiding one another, with intent to kill did then and there willfully, unlawfully and feloniously stab and hit with a lead pipe and bladed weapon one Marlon Araque y Daniel on the vital portions of his body, thereby inflicting serious and mortal wounds which would have cause[d] the death of the said victim thus performing all the acts of execution which should have produce[d] the crime of Homicide as a consequence but nevertheless did not produce it by reason of causes independent of their will, that is by timely and able medical attendance rendered to said Marlon Araque y Daniel which prevented his death.

CONTRARY TO LAW.

Upon arraignment, accused Agapito Listerio y Prado and Samson dela Torre y Esquela pleaded not guilty to the crimes charged. Their other co-accused have remained at large.

Trial thereafter ensued after which the court a quo rendered judgment only against accused Agapito Listerio because his co-accused Samson dela Torre escaped during the presentation of the prosecution's evidence and he was not tried in absentia. The dispositive portion of the decision[3] reads:

WHEREFORE, finding Accused AGAPITO LISTERIO guilty beyond reasonable doubt, he is sentenced:

- For the death of Jeonito Araque y Daniel in Criminal Case NO. 91-5842, RECLUSION PERPETUA;
- For the attempt to kill Marlon Araque y Daniel, in Criminal Case No. 91-5843, he is sentenced to six (6) months and one (1) day as minimum, to four (4) years as maximum;
- As civil indemnity, he is ordered to indemnify the heirs of Jeonito Araque y Daniel the sum[s] of :
P54,200.66 as actual damages;
P50,000.00 as moral damages;
P5,000.00 as exemplary damages.
- And for the damages sustained by Marlon Araque y Daniel, he is required to pay Marlon Araque y Daniel, the sum[s] of :
P5,000.00 as actual damages;
P5,000.00 as moral damages; and
P5,000.00 as exemplary damages
SO ORDERED.[4]

Dissatisfied, accused Agapito Listerio interposed this appeal alleging that –

I
THE PROSECUTION EVIDENCE FAILED TO ESTABLISH THE GUILT OF THE ACCUSED BEYOND REASONABLE DOUBT.

II
THE COURT CONVICTED THE ACCUSED OF THE CRIME OF MURDER AND ATTEMPTED HOMICIDE DESPITE ABSENCE OF PROOF OF CONSPIRACY AND AGGRAVATING CIRCUMSTANCE OF TREACHERY.

The version of the prosecution of what transpired on that fateful day of August 14, 1991 culled from the eyewitness account of Marlon Araque discloses that at around 5:00 p.m. of August 14, 1991, he and his brother Jeonito were in Purok 4, Alabang, Muntinlupa to collect a sum of money from a certain Tino.[5] Having failed to collect anything from Tino, Marlon and Jeonito then turned back.[6] On their way back while they were passing Tramo near Tino's place,[7] a group composed of Agapito Listerio, Samson dela Torre, George dela Torre, Marlon dela Torre and Bonifacio Bancaya[8] blocked their path[9] and attacked them with lead pipes and bladed weapons.[10]

Agapito Listerio, Marlon dela Torre and George dela Torre, who were armed with bladed weapons, stabbed Jeonito Araque from behind.[11] Jeonito sustained three (3) stab wounds on the upper right portion of his back, another on the lower right portion and the third on the middle portion of the left side of his back[12] causing him to fall down.[13] Marlon Araque was hit on the head by Samson dela Torre and Bonifacio Bancaya with lead pipes and momentarily lost consciousness.[14] When he regained his senses three (3) minutes later, he saw that Jeonito was already dead.[15] Their assailants then fled after the incident.[16] Marlon Araque who sustained injuries in the arm and back,[17] was thereafter brought to a hospital for treatment.[18]

Marlon Araque was examined by Dr. Salvador Manimtim, head of the Medico Legal Division of the UP-PGH, [19] who thereafter issued a Medical Certificate[20] indicating that Marlon Araque sustained two (2) lacerated wounds, one measuring 5 centimeters in length located in the center (mid-parietal area) of the ear.[21] The second

lacerated wound measuring 2 centimeters in length is located at the mid-frontal area commonly known as the forehead.[22] A third lacerated wound measuring 1.5 centimeters long is located at the forearm[23] and a fourth which is a stab wound measuring 3 centimeters is located at the right shoulder at the collar.[24] Elaborating on the nature of Marlon Araque's injuries, Dr. Manimtim explained in detail during cross-examination that the two (2) wounds on the forearm and the shoulder were caused by a sharp object like a knife while the rest were caused by a blunt instrument such as a lead pipe.[25]

Dr. Bievenido Munoz, NBI Medico Legal Officer conducted an autopsy on the cadaver of Jeonito Araque[26] and prepared an Autopsy Report[27] of his findings. The report which contains a detailed description of the injuries inflicted on the victim shows that the deceased sustained three (3) stab wounds all of them inflicted from behind by a sharp, pointed and single-bladed instrument like a kitchen knife, balisong or any similar instrument.[28] The first stab wound, measuring 1.7 centimeters with an approximate depth of 11.0 centimeters, perforated the lower lobe of the left lung and the thoracic aorta.[29] Considering the involvement of a vital organ and a major blood vessel, the wound was considered fatal.[30] The second wound, measuring 2.4 centimeters, affected the skin and underlying soft tissues and did not penetrate the body cavity.[31] The third wound measuring 2.7 centimeters was like the second and involved only the soft tissues.[32] Unlike the first, the second and third wounds were non-fatal.[33] Dr. Munoz averred that of the three, the first and second wounds were inflicted by knife thrusts delivered starting below going upward by assailants who were standing behind the victim.[34]

On the other hand, accused-appellant's version of the incident is summed thus in his brief:

1. Accused-appellant is 39 years old, married, side walk vendor and a resident of Purok 4, Bayanan, Muntinlupa, Metro Manila. He earns a living by selling vegetables.[35]
2. At around 1:00 o'clock in the afternoon of August 14, 1991, Accused-Appellant was in the store of Nimfa Agustin having a little fun with Edgar Demolador and Andres Gininao drinking beer. At around 2:00 o'clock Accused-appellant went to his house and slept.[36]
3. While asleep, at about 5 o'clock, Edgar Remolador and Andres Gininao woke him up and told him there was a quarrel near the railroad track.[37]
4. At around 6:00 o'clock two (2) policemen passed by going to the house of Samson de la Torre while Accused-appellant was chatting with Edgar Remolador and Andres Gininao. These two (2) policemen together with co-accused Samson de la Torre came back and invited Accused-appellant for questioning at the Muntinlupa Police Headquarters together with Edgar Demolador and Andres Gininao. Subsequently, Edgar Demolador and Andres Gininao were sent home.[38]
5. At the Police Station, Accused-Appellant was handed a Sinumpaang Salaysay executed by Marlon Araque, implicating him for the death of Jeonito Araque and the frustrated murder of Marlon Araque. Accused-Appellant confronted Marlon Araque as to why he was being included in the case. Marlon Araque answered "because you eject[ed] us from your house."[39]

Professing his innocence, accused-appellant claims that Marlon Araque's uncorroborated testimony failed to clearly and positively identify him as the malefactor responsible for his brother's death. In fine, he insists that Marlon's testimony is insufficient to convict him of the crimes charged.

We disagree.

It is well settled that witnesses are to be weighed, not numbered, such that the testimony of a single, trustworthy and credible witness could be sufficient to convict an accused.[40] More explicitly, the well entrenched rule is that "the testimony of a lone eyewitness, if found positive and credible by the trial court is sufficient to support a conviction especially when the testimony bears the earmarks of truth and sincerity and had been delivered

spontaneously, naturally and in a straightforward manner. It has been held that witnesses are to be weighed not numbered; hence, it is not at all uncommon to reach a conclusion of guilt on the basis of the testimony of a single witness.”[41]

The trial court found Marlon Araque’s version of what transpired candid and straightforward. We defer to the lower court’s findings on this point consistent with the oft-repeated pronouncement that: “the trial judge is the best and the most competent person who can weigh and evaluate the testimony of witnesses. His firsthand look at the declarant’s demeanor, conduct and attitude at the trial places him in a peculiar position to discriminate between the true and the false. Consequently appellate courts will not disturb the trial court’s findings save only in cases where arbitrariness has set in and disregard for the facts important to the case have been overlooked.”[42]

The account of Marlon Araque as to how they were assaulted by the group of accused-appellant was given in a categorical, convincing and straightforward manner:

Q

Mr. Witness, do you know a certain Jeonito Araque y Daniel?

A

Yes, sir.

Q

And why do you know him?

A

He is my brother.

Q

Where is Jeonito Araque now?

A

He is already dead.

Q

When did he die?

A

Last August 14.

Q

Do you know of your own knowledge how he died?

A

Yes, sir.

Q

Will you please inform the Honorable Court what is your own knowledge?

A

He was stabbed, sir.

Q

Do you know the person or persons who stabbed him?

A

Yes, sir.

Q

Will you please inform the Honorable Court who are these person or persons, if you know?

A

Its (sic) Agapito Listerio, Samson dela Torre, George dela Torre, Marlon dela Torre and Bonifacio.

Q

Now if these persons [are] inside the courtroom, could you identify them?

A

They (sic) are only two persons but the three persons is (sic) not around.

Q

Could you please point to this Honorable Court who are these two persons in side the courtroom?

A

Yes, sir (Witness pointing to a persons [sic] and when asked [identified themselves as] Agapito Listerio and Samson dela Torre.)

Q

Now, at around 5:00 o'clock in the afternoon of August 14, 1991, do you recall where were you?

A

Yes, sir.

Q

Will you please inform the Honorable Court where were you at that time?

A

I'm in Alabang at Purok 4 and I'm collecting.

Q

Do you have any companion at that time?

A

Yes, sir.

Q

What are you doing at that time in [that] particular date?

A

I'm collecting from a certain Tino.

Q

Were you able to collect?

A

No, sir.

Q

If you said that there were no collections, what did you do?

A

We went back.

Q

When you went back, did you have any companion?

A

Yes, sir.

Q

Who was your companion?

A

My brother.

Q

While you were going back, was there any untoward incidents that happened?

A

Yes sir “Hinarang po kami.”

Q

Now, what particular place [where] you were waylaid, if you recall?

A

In Tramo, near Tino’s place.

Q

And who were the persons that were waylaid (sic)?

A

Agapito Listerio, Samson dela Torre, George dela Torre and Bonifacio.

Q

Will you please inform the Honorable Court how will (sic) you waylaid by these persons?

A

We were walking then suddenly they stabbed us with knife (sic) and ran afterwards.

Q

Who were the persons that waylaid you?

A

Agapito Listerio, George and Marlon.

Q

How about your brother, what happened to him?

A

He fall (sic) down.

Q

And after he fall (sic) down, do you know what happened?

A

I was hit by a lead pipe that's why I painted (sic).

Q

Do you know the reason why your brother fall (sic) down?

A

I cannot recall, sir. Because I already painted (sic).

Q

Do you know the reason why your brother fall (sic) before you painted (sic)?

A

Yes, sir.

Q

Will you please inform the Honorable Court why your brother fall (sic) down?

xxx xxx xxx

A

Yes, sir, because he was stabbed.

Q

What particular place of his body was [he] stabbed if you know?

A

At the back of his body.

Q

Do you know the person or persons who was (sic) stabbed him?

A

Yes, sir.

Q

Will you please inform the Honorable Court who was that persons was stabbed him?

A

Agapito, Marlon and George.

COURT

How many stabbed [him], if you know?

A

Three (3), sir.

COURT

In what particular part of his body was stabbed wound (sic)?

A

Witness pointing to his back upper right portion of the back, another on the lower right portion and another on the middle portion of the left side at the back.

COURT

Proceed.

Q

Will you please inform the Honorable Court why you are (sic) lost consciousness?

A

I was hit by [a] lead pipe by Samson and Bonifacio.

Q

And when did you regain consciousness?

A

After three minutes.

Q

And when you gain[ed] consciousness, what happened to your brother?

A

He was already dead.

Q

How about you, what did you do?

A

I go (sic) to the Hospital.

Q

How about the accused, the persons who way laid, what happened to them?

A

From what I know, they ran away.[43]

Persistent efforts by defense counsel to establish that the attack was provoked, by eliciting from Marlon Araque an admission that he and the deceased had a drinking spree with their attackers prior to the incident, proved futile as Marlon steadfastly maintained on cross examination that he and his brother never drank liquor on that fateful day:

Q

After your work, was there an occasion when you drink something with your borther (sic)?

A

No, sir.

Q

And you stand to your testimony that you never drink (sic) on August 14, 1991?

A

Yes, sir.

Q

Were (sic) there no occasion on August 14, 1991 when you visited Sonny Sari-Sari Store at 4:00 p.m. on August 14, 1991?

A

No, sir.

Q

And did you not have a drinking spree with George dela Torre?

A

No, sir.

Q

Marlon dela Torre?

A

No, sir.

Q

Bonifacio?

A

With your borthor (sic)?

Q

So you want to tell this Honorable Court that there was no point in time on August 14, 1991 at 4:00 p.m. that you did not take a sip of wine?

A

No, sir.

Q

Neither your brother?

Atty. Agoot

Objection, Your Honor, the question is vague.

COURT

Ask another question.

Q

Mr. Witness, will you please tell the Honorable Court where this George dela Torre, Marlon dela Torre and a certain Bonifacio were?

Atty. Agoot

Witness is incompetent.

Q

Mr. Witness, you testified that it was your brother the deceased who invited you to Purok 4?

A

Yes, sir.

Atty. Lumakang

That will be all for the witness, your Honor.[44]

That Marlon was able to recognize the assailants can hardly be doubted because relatives of the victim have a natural knack for remembering the faces of the attackers and they, more than anybody else, would be concerned with obtaining justice for the victim by the felons being brought to the face of the law.[45] Indeed, family members who have witnessed the killing of a loved one usually strive to remember the faces of the assailants.[46] Marlon's credibility cannot be doubted in this case because as a victim himself and an eyewitness to the incident, it can be clearly gleaned from the foregoing excerpts of his testimony that he remembered with a high degree of reliability the identity of the malefactors.[47]

Likewise, there is no showing that he was motivated by any ill-feeling or bad blood to falsely testify against accused-appellant. Being a victim himself, he is expected to seek justice. It is settled that if the accused had nothing to do with the crime, it would be against the natural order of events to falsely impute charges of wrongdoing upon him.[48] Accused-appellant likewise insists on the absence of conspiracy and treachery in the attack on the victims.

We remain unconvinced.

It must be remembered that direct proof of conspiracy is rarely found for criminals do not write down their lawless plans and plots.[49] Conspiracy may be inferred from the acts of the accused before, during and after the commission of the crime which indubitably point to and are indicative of a joint purpose, concert of action and community of interest.[50] Indeed –

A conspiracy exists when two or more persons come to an agreement concerning the commission of a felony and decide to commit it. To establish the existence of a conspiracy, direct proof is not essential since it may be shown by facts and circumstances from which may be logically inferred the existence of a common design among the accused to commit the offense charged, or it may be deduced from the mode and manner in which the offense was perpetrated.[51]

More explicitly –

... conspiracy need not be established by direct evidence of acts charged, but may and generally must be proved by a number of indefinite acts, conditions and circumstances, which vary according to the purpose accomplished. Previous agreement to commit a crime is not essential to establish a conspiracy, it being sufficient that the condition attending to its commission and the acts executed may be indicative of a common design to accomplish a criminal purpose and objective. If there is a chain of circumstances to that effect, conspiracy can be established.[52]

Thus, the rule is that conspiracy must be shown to exist by direct or circumstantial evidence, as clearly and convincingly as the crime itself.[53] In the absence of direct proof thereof, as in the present case, it may be deduced from the mode, method, and manner by which the offense was perpetrated, or inferred from the acts of the accused themselves when such acts point to a joint purpose and design, concerted action and community of interest.[54] Hence, it is necessary that a conspirator should have performed some overt acts as a direct or indirect contribution in the execution of the crime planned to be committed. The overt act may consist of active participation in the actual commission of the crime itself, or it may consist of moral assistance to his co-conspirators by being present at the commission of the crime or by exerting moral ascendancy over the other co-conspirators.[55]

Conspiracy transcends mere companionship, it denotes an intentional participation in the transaction with a view to the furtherance of the common design and purpose.[56] “Conspiracy to exist does not require an agreement for an appreciable period prior to the occurrence.[57] From the legal standpoint, conspiracy exists if, at the time of the commission of the offense, the accused had the same purpose and were united in its execution.”[58] In this case, the presence of accused-appellant and his colleagues, all of them armed with deadly weapons at the locus criminis, indubitably shows their criminal design to kill the victims.

Nowhere is it more evident than in this case where accused-appellant and his cohorts blocked the path of the victims and as a group attacked them with lead pipes and bladed weapons. Accused-appellant and his companions acted in concert during the assault on the victims. Each member of the group performed specific and coordinated acts as to indicate beyond doubt a common criminal design or purpose.[59] Thus, even assuming *arguendo* that the prosecution eyewitness may have been unclear as to who delivered the fatal blow on the victim, accused-appellant as a conspirator is equally liable for the crime as it is unnecessary to determine who inflicted the fatal wound because in conspiracy, the act of one is the act of all.[60]

As to the qualifying circumstances here present, the treacherous manner in which accused-appellant and his group perpetrated the crime is shown not only by the sudden and unexpected attack upon the unsuspecting and apparently unarmed victims but also by the deliberate manner in which the assault was perpetrated. In this case, the accused-appellant and his companions, all of them armed with bladed weapons and lead pipes, blocked (hinarang) the path of the victims effectively cutting off their escape.[61] In the ensuing attack, the deceased was stabbed three (3) times from behind by a sharp, pointed and single-bladed instrument like a kitchen knife, balisong or similar instrument[62] while Marlon Araque sustained lacerated wounds in the head caused by blows inflicted by lead pipes as well as stab wounds on the shoulder and forearm which were caused by a sharp object like a knife.[63]

It must be noted in this regard that the manner in which the stab wounds were inflicted on the deceased were clearly meant to kill without posing any danger to the malefactors considering their locations and the fact that they were caused by knife thrusts starting below going upward by assailants who were standing behind the victim.[64] Treachery is present when the offender commits any of the crimes against persons employing means, methods or forms in the execution thereof which tend directly and specially to insure its execution, without risk to himself arising from the defense which the offended party might make.[65] That circumstance qualifies the crime into murder.

The commission of the crime was also attended by abuse of superior strength on account of the fact that accused-appellant and his companions were not only numerically superior to the victims but also because all of them, armed with bladed weapons and lead pipes, purposely used force out of proportion to the means of defense available to the persons attacked. However, this aggravating circumstance is already absorbed in treachery.[66] Furthermore, although alleged in the information, evident premeditation was not proved by the prosecution. In the light of the finding of conspiracy, evident premeditation need not be further appreciated, absent concrete proof as to how and when the plan to kill was hatched or what time had elapsed before it was carried out.[67]

In stark contrast to the evidence pointing to him as one of the assailants of the victims, accused-appellant proffers the defense of alibi. At the risk of sounding trite, it must be remembered that alibi is generally considered with suspicion and always received with caution because it can be easily fabricated.[68] For alibi to serve as a basis for acquittal, the accused must establish that: a.] he was present at another place at the time of the perpetration of the offense; and b.] it would thus be physically impossible for him to have been at the scene of the crime.[69]

Suffice it to state that accused-appellant failed to discharge this burden. The positive identification of the accused

as one of the perpetrators of the crime by the prosecution eyewitness, absent any showing of ill-motive, must prevail over the weak and obviously fabricated alibi of accused-appellant.[70] Furthermore, as aptly pointed out by the trial court “[t]he place where the accused was at the time of the killing is only 100 meters away. The distance of his house to the place of the incident makes him physically possible to be a participant in the killing [of Jeonito] and [the] wounding of Marlon.”[71]

All told, an overall scrutiny of the records of this case leads us to no other conclusion than that accused-appellant is guilty as charged for Murder in Criminal Case No. 91-5842.

In Criminal Case No. 91-5843, wherein accused-appellant was indicted for Frustrated Homicide, the trial court convicted accused-appellant of Attempted Homicide only on the basis of Dr. Manimtim’s testimony that none of the wounds sustained by Marlon Araque were fatal.

The reasoning of the lower court on this point is flawed because it is not the gravity of the wounds inflicted which determines whether a felony is attempted or frustrated but whether or not the subjective phase in the commission of an offense has been passed. By subjective phase is meant “[t]hat portion of the acts constituting the crime included between the act which begins the commission of the crime and the last act performed by the offender which, with the prior acts, should result in the consummated crime. From that time forward, the phase is objective. It may also be said to be that period occupied by the acts of the offender over which he has control – that period between the point where he begins and the point where he voluntarily desists. If between these two points the offender is stopped by reason of any cause outside of his own voluntary desistance, the subjective phase has not been passed and it is an attempt. If he is not so stopped but continues until he performs the last act, it is frustrated.”[72]

It must be remembered that a felony is frustrated when: 1.] the offender has performed all the acts of execution which would produce the felony; 2.] the felony is not produced due to causes independent of the perpetrator’s will.[73] On the other hand, in an attempted felony: 1.] the offender commits overt acts to commence the perpetration of the crime; 2.] he is not able to perform all the acts of execution which should produce the felony; and 3.] his failure to perform all the acts of execution was due to some cause or accident other than his spontaneous desistance.[74] The distinction between an attempted and frustrated felony was lucidly differentiated thus in the leading case of U.S. v. Eduave:[75]

A crime cannot be held to be attempted unless the offender, after beginning the commission of the crime by overt acts, is prevented, against his will, by some outside cause from performing all of the acts which should produce the crime. In other words, to be an attempted crime the purpose of the offender must be thwarted by a foreign force or agency which intervenes and compels him to stop prior to the moment when he has performed all of the acts which should produce the crime as a consequence, which acts it is his intention to perform. If he has performed all the acts which should result in the consummation of the crime and voluntarily desists from proceeding further, it cannot be an attempt. The essential element which distinguishes attempted from frustrated felony is that, in the latter, there is no intervention of a foreign or extraneous cause or agency between the beginning of the commission of crime and the moment when all the acts have been performed which should result in the consummated crime; while in the former there is such intervention and the offender does not arrive at the point of performing all of the acts which should produce the crime. He is stopped short of that point by some cause apart from his voluntary desistance.

To put it another way, in case of an attempt the offender never passes the subjective phase of the offense. He is interrupted and compelled to desist by the intervention of outside causes before the subjective phase is passed.

On the other hand, in case of frustrated crimes, the subjective phase is completely passed. Subjectively the crime is complete. Nothing interrupted the offender while he was passing through the subjective phase. The

crime, however, is not consummated by reason of the intervention of causes independent of the will of the offender. He did all that was necessary to commit the crime. If the crime did not result as a consequence it was due to something beyond his control.

In relation to the foregoing, it bears stressing that intent to kill determines whether the infliction of injuries should be punished as attempted or frustrated murder, homicide, parricide or consummated physical injuries.[76] Homicidal intent must be evidenced by acts which at the time of their execution are unmistakably calculated to produce the death of the victim by adequate means.[77] Suffice it to state that the intent to kill of the malefactors herein who were armed with bladed weapons and lead pipes can hardly be doubted given the prevailing facts of the case. It also can not be denied that the crime is a frustrated felony not an attempted offense considering that after being stabbed and clubbed twice in the head as a result of which he lost consciousness and fell, Marlon's attackers apparently thought he was already dead and fled.

An appeal in a criminal case throws the whole case wide open for review[78] and the reviewing tribunal can correct errors, though unassigned in the appealed judgement[79] or even reverse the trial court's decision on the basis of grounds other than those that the parties raised as errors.[80] With the foregoing in mind, we now address the question of the proper penalties to be imposed.

With regard to the frustrated felony, Article 250 of the Revised Penal Code provides that –

ART. 250. Penalty for frustrated parricide, murder, or homicide. – The courts, in view of the facts of the case, may impose upon the person guilty of the frustrated crime of parricide, murder or homicide, defined and penalized in the preceding articles, a penalty lower by one degree than that which should be imposed under the provisions of article 50.[81]

The courts, considering the facts of the case, may likewise reduce by one degree the penalty which under article 51 should be imposed for an attempt to commit any of such crimes.

The penalty for Homicide is reclusion temporal[82] thus, the penalty one degree lower would be prision mayor.[83] With the presence of the aggravating circumstance of abuse of superior strength and no mitigating circumstances, the penalty is to be imposed in its maximum period.[84] Prision mayor in its maximum period ranges from ten (10) years and one (1) day to twelve (12) years. Applying further the Indeterminate Sentence Law,[85] the minimum of the imposable penalty shall be within the range of the penalty next lower in degree, i.e. prision correccional in its maximum period which has a range of six (6) months and one (1) day to six (6) years.

What now remains to be determined is the propriety of the awards made by the trial court with regard to the civil aspect of the case for the death of Jeonito Araque and the injuries sustained by Marlon Araque.

Anent actual or compensatory damages, it bears stressing that only substantiated and proven expenses or those which appear to have been genuinely incurred in connection with the death, wake or burial of the victim will be recognized by the courts.[86] In this case, the expenses incurred for the wake, funeral and burial of the deceased are substantiated by receipts.[87] The trial court's award for actual damages for the death of Jeonito Araque should therefore be affirmed.

In line with current jurisprudence,[88] the award of P50,000.00 as civil indemnity ex delicto must also be sustained as it requires no proof other than the fact of death of the victim and the assailant's responsibility therefor.[89] The award for moral damages for the pain and sorrow suffered by the victim's family in connection with his untimely death must likewise be affirmed. The award is adequate, reasonable and with sufficient basis taking into consideration the anguish and suffering of the deceased's family particularly his mother who relied solely upon him for support.[90] The award of exemplary damages should likewise be affirmed considering that an aggravating circumstance attended the commission of the crime.[91]

The trial court, however, correctly ignored the claim for loss of income or earning capacity of the deceased for lack of factual basis. The estimate given by the deceased's sister on his alleged income as a 'pre-cast' businessman is not supported by competent evidence like income tax returns or receipts. It bears emphasizing in this regard that compensation for lost income is in the nature of damages^[92] and as such requires due proof thereof.^[93] In short, there must be unbiased proof of the deceased's average income.^[94] In this case, the victim's sister merely gave an oral, self-serving and hence unreliable statement of her deceased brother's income.

As for the awards given to Marlon Araque, the award for actual damages must be affirmed as the same is supported by documentary evidence.^[95] With regard to moral and exemplary damages, the same being distinct from each other require separate determination.^[96] The award for moral damages must be struck down as the victim himself did not testify as to the moral suffering he sustained as a result of the assault on his person. For lack of competent proof such an award is improper.^[97] The award for exemplary damages must, however, be retained considering that under Article 2230 of the Civil Code, such damages may be imposed "when the crime is committed with one or more aggravating circumstances."^[98]

Finally, this Court has observed that the trial court did not render judgment against accused Samson dela Torre, notwithstanding that he was arraigned and pleaded not guilty to both charges. Under the circumstances, he should be deemed to have been tried in absentia and, considering the evidence presented by the prosecution against him, convicted of the crime charged together with appellant Agapito Listerio.

WHEREFORE, the appealed decision is AFFIRMED with the following MODIFICATIONS:

1.]

the award of P5,000.00 to Marlon Araque by way of moral damages in Criminal Case No. 91-5843 is DELETED;

2.]

Accused-Appellant is found GUILTY beyond reasonable doubt in Criminal Case No. 91-5843 of Frustrated Homicide and is sentenced to suffer an indeterminate penalty of Six (6) Years of Prison Correccional, as minimum to Ten (10) Years and One (1) Day of Prison Mayor, as maximum.

After finality of this Decision, the records shall be remanded to the Regional Trial Court of Makati City, which is directed to render judgment based on the evidence against Samson dela Torre y Esquela.

SO ORDERED.

Davide, Jr., (Chairman), Puno, Kapunan, and Pardo, JJ., concur.

[1]Rollo, p. 13.

[2]Ibid., p. 14.

[3]Id., pp. 80-91.

[4]Id., pp. 90-91.

[5]TSN, 18 November 1991, pp. 5-6.

[6]Ibid., p. 6.

[7]Id., p. 7.

- [8]Id., p. 5.
- [9]Id., p. 7.
- [10]Id., pp. 7-8.
- [11]Id., pp. 8-9.
- [12]Id., p. 9.
- [13]Id., p. 8.
- [14]Id., pp. 8, 10.
- [15]Id., p. 10.
- [16]Id. pp. 7, 10.
- [17]Id., p. 10.
- [18]Id., pp. 10-12; Exhibit A.
- [19]TSN, 22 July 1992, pp. 6, 11.
- [20]Ibid., pp. 7-8; Exhibit I and series.
- [21]Id., pp. 8-9.
- [22]Id., p. 9.
- [23]Id., pp. 9, 18.
- [24]Id., pp. 8-9, 19-20.
- [25]Id., pp. 21-23.
- [26]TSN, 13 June 1994, p. 6.
- [27]Ibid., p. 6; Exhibit H and series.
- [28]Ibid., pp. 7-9, 10-12; Exhibits H-1; H-2 and H-3.
- [29]Id., pp. 7-8; Exhibit H-1.
- [30]Id., p. 8.
- [31]Id.; Exhibit H-2.
- [32]Id.; Exhibit H-3.
- [33]Id., p. 9.
- [34]Id., pp. 10-11
- [35]TSN, 26 August 1992, p. 2.
- [36]Ibid., pp. 14-15.
- [37]Id., pp. 15-16.
- [38]Id., pp. 16-17.

[39]Id., p. 16.

[40]People v. Gregorio Tolibas @ "Gorio", et al., G.R. No. 103506, 15 February 2000, p. 9, citing People v. De la Paz, Jr., 299 SCRA 92 [1998].

[41] People v. Carlie Alagon, et al., G.R. Nos. 126536-37, 10 February 2000, p. 13, citing People v. Mallari, G.R. No. 103547, 20 July 1999.

[42][]People v. Nicanor Llanes y Lebreña, et al., G.R. No. 116986, 4 February 2000, p. 14, citing People v. Gatchalian, 300 SCRA 1 [1998]; People v. Lapay, 298 SCRA 62 [1998]; People v. Daraman, 294 SCRA 27 [1998].

[43]TSN, 18 November 1991, pp. 3-10.

[44]TSN, 27 November 1991, pp. 9-11.

[45]People v. Jose Binas @ Nestor Binas, G.R. No. 121630, 8 December 1999, p. 33, citing People v. Bundang, 272 SCRA 641 [1997], citing People v. Escoto, 244 SCRA 87 [1995].

[46]People v. Jose Binas @ Nestor Binas, *supra*, citing People v. Cawaling, 293 SCRA 267 [1998], citing People v. Ramos, 260 SCRA 402 [1996].

[47]People v. Joey Aquino y Acedo, et al., G.R. No. 129288, 30 March 2000, p. 14, citing People v. Gomez, 251 SCRA 455 [1995], citing People v. Teehankee, 249 SCRA 54 [1995].

[48]People v. Padilla, 242 SCRA 629 [1995]; People v. De Leon, 245 SCRA 538 [1995]; People v. Malunes, 247 SCRA 317 [1995]; People v. Hubilla, Jr., 252 SCRA 471 [1996]; People v. Cristobal, 252 SCRA 507 [1996]; People v. Laurente, 255 SCRA 543 [1996]; People v. Excija, 258 SCRA 424 [1996]; People v. Villegas, 262 SCRA 314 [1996]; People v. Leoterio, 264 SCRA 608 [1996].

[49]People v. Cawaling, 293 SCRA 267 [1998].

[50]People v. Lotoc, G.R. No. 132166, 19 May 1999, 307 SCRA 471, citing People v. Magallano, 266 SCRA 305 [1997].

[51]People v. Heracleo Manriquez y Alia, et al., G.R. No. 122510-11, 17 March 2000, p. 12, citing People v. Silvestre, 244 SCRA 479 [1995]; People v. Hubilla, Jr., *supra*; People v. Pecho, 262 SCRA 518 [1996].

[52]People v. Marañon, 199 SCRA 421 [1991].

[53]People v. Trinidad, 162 SCRA 714 [1988].

[54]People v. Datun, 272 SCRA 380 [1997].

[55]People v. Ramil Dacibar, et al., G.R. No. 111286, 17 February 2000, pp. 13-14, citing People v. Berroya, 283 SCRA 111 [1998]; *italics supplied*.

[56]People v. Alejandro Marquita, et al., G.R. Nos. 119958-62, 1 March 2000, citing People v. Quinao, 269 SCRA 495 [1997]; People v. Manuel, 234 SCRA 532 [1994]; People v. Aniel, 96 SCRA 199 [1980] and People v. Izon, et al., 106 Phil. 690 [1958].

[57]People v. Patalinghug, G.R. Nos. 125814-15, p. 18; People v. Aquino, G. R. No. 126047, 16 September 1999, p. 5.

[58]People v. Cielito Buluran y Ramirez, et al. G.R. No. 113940, 15 February 2000, p. 9.

[59]People v. Alas, 274 SCRA 310 [1997].

[60]People v. Maldo, G.R. No. 131347, 19 May 1999, 307 SCRA 424, citing People v. Magallano, supra.; People v. Palomar, 278 SCRA 114 [1997]; People v. Dinglasan, 267 SCRA 26 [1997]; People v. Cabiles, Sr., 268 SCRA 271 [1996].

[61]TSN, 18 November 1991, p. 7.

[62]TSN, 13 June 1994, pp. 7-9, 10-12; Exhibits H-1, H-2 and H-3.

[63]TSN, 13 June 1994, p. 6.

[64]Ibid., pp. 10-11.

[65]People v. Felipe Abordo, et al., G.R. No. 107245, 17 December 1999, p. 15, citing People v. Patrolla, Jr., 254 SCRA 467 [1996].

[66]People v. Romeo Ugiaban Lumandong, G.R. No. 132745, 9 March 2000, p. 18; People v. Pedro Lumacang, et al., G.R. No. 120283, 1 February 2000, p. 13, citing People v. Panganiban, 241 SCRA 91 [1995].

[67]People v. Felipe Abordo, et al., supra., citing People v. Patrolla, supra., citing People v. Penones, 200 SCRA 624 [1991].

[68]People v. Cornelia Suelto @ "Ely", G.R. No. 126097 8, February 2000, p. 10, citing People v. Tulop, 289 SCRA 316 [1998].

[69]People v. Belaro, G.R. No. 99869, 26 May 1999, 307 SCRA 591, citing People v. Zamora, 278 SCRA 60 [1997]; People v. Balderas, 276 SCRA 470 [1997]; People v. Patawaran, 274 SCRA 130 [1997]; People v. Balmoria, 287 SCRA 687 [1998]; People v. Ravaness, 283 SCRA 634 [1998].

[70]People v. Andres, 296 SCRA 318 [1998]; People v. Enriquez, 292 SCRA 656 [1998].

[71]Rollo, p. 38.

[72]Aquino R.C. and Grino-Aquino C.C., Revised Penal Code. Vol. 1, 1997 ed., p. 109.

[73]Ibid., p. 108.

[74]Id., p. 98.

[75]36 Phil. 209 [1917].

[76]Aquino and Grino-Aquino, Revised Penal Code, supra, p. 98.

[77]Aquino and Grino-Aquino, Revised Penal Code, supra, Vol. II, p. 626.

[78]People v. Court of Appeals, G.R. No. 128986, 21 June 1999, 307 SCRA 687.

[79]People v. Reyes, 285 SCRA 124 [1998]; Obosa v. CA,

[80]Catholic Bishop of Balanga v. Court of Appeals, 264 SCRA 181 [1996].

[81]ART. 50. Penalty to be imposed upon principals of a frustrated crime. - The penalty next lower in degree than that prescribed by law for the consummated felony shall be imposed upon the principals in a frustrated felony.

[82]Art. 249, Revised Penal Code.

[83]Art. 70, Revised Penal Code.

[84]Art. 64, par. 3, Revised Penal Code.

[85]Act No. 4103, as amended by Act No. 4225, Section 1.

[86]People v. Carlito Ereno y Ayson, G.R. No. 124706, 22 February 2000, p. 10, citing People v. Jamiro, 279 SCRA 290 [1997] and People v. Degoma, 209 SCRA 266 [1992].

[87]Exhibits F, F-1, F-2, and F-3; Record, pp. 150-152.

[88]People v. Maximo Hernandez y De Guzman, G.G. No. 130809, 15 March 2000, p. 12, citing People v. Ebrada, 296 SCRA 353 [1998]; People v. Benito Mier y Vistal, G.R. No. 130598, 3 February 2000, p. 17.

[89]People v. Samson Suplito, G.R. No. 104944, 16 September 1999; People v. Bautista, G.R. No. 96092, 17 August 1999; People v. Panida, G.R. Nos. 127125 and 138952, 6 July 1999; People v. Ortega, 276 SCRA 166 [1997]; People v. Espanola, 271 SCRA 689 [1997]; People v. Cordero, 263 SCRA 122 [1996].

[90]TSN, 27 April 1992, p. 5.

[91]People v. Carlie Alagon, et al., G.R. No. 126536-37, 10 February 2000, pp. 19-20.

[92]See Heirs of Raymundo Castro v. Bustos, 27 SCRA 327 [1968].

[93]De la Paz v. IAC, 154 SCRA 65 [1987]; Scott Consultants and Resource Development Corporation v. CA, 242 SCRA 393 [1995]; PNOC Transport Corporation v. CA, 297 SCRA 402 [1998].

[94]People v. Villanueva, 302 SCRA 380 [1999].

[95]Exhibits A, I, I-1 and I-2; Record, pp. 148, 156.

[96]People v. Carlie Alagon, et al., supra, p. 19.

[97]People v. Madelo Espina y Casanares, G.R. No. 123102, 29 February 2000, p. 13, citing People v. Guillermo, 302 SCRA 257 [1999] and People v. Noay, 296 SCRA 292 [1998]; See also People v. Verde, 302 SCRA 690 [1999].

[98]People v. Rogelio Galam, G.R. No. 114740, 15 February 2000, p. 13; People v. Carlie Alagon, et al., supra.

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